Note from the Field

Cold Fusion Confusion
The Equal Employment Opportunity Commission's Incredible Interpretation of Religion in *LaViolette v. Daley*

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Is cold fusion[1] the equivalent of Catholicism? Is believing in extraterrestrials the same as being an Episcopalian? In the recent Equal Employment Opportunity Commission (EEOC) decision of *LaViolette v. Daley*,[2] the EEOC held that the complainant's unusual beliefs regarding cold fusion, cryptic messages from extraterrestrials, and other "scientific" beliefs are entitled to the same protection in the workplace from discrimination as religious beliefs.[3] This note, by examining the facts of the case, the relevant statutes, agency regulations, and case law, will demonstrate that the EEOC's ruling has impermissibly expanded the definition of "religion" to the point that it has created a new cause of actionable discrimination—something the EEOC has neither the power nor the authority to do.

Genesis

Paul LaViolette had been a patent examiner with the Patent and Trademark Office (PTO) until he was fired on 9 April 1999.[4] On 28 June 1999, LaViolette filed a formal complaint of discrimination, alleging that the PTO fired and refused to rehire him based upon his "unconventional beliefs about cold fusion and other technologies."[5] The Department of Commerce, of which the PTO is part, dismissed LaViolette's complaint on 13 September 1999, for failure to state a claim within the purview of Title VII of the Civil Rights Act of 1964.[6]

LaViolette appealed the dismissal, arguing that "'discrimination against a person on account of his beliefs is the essence of discrimination on the basis of religion.' Therefore, he contends, his scientific beliefs in cold fusion are protected."[7] The EEOC reversed the agency's dismissal of his complaint and remanded it for further processing.[8] While an agency must dismiss a complaint of discrimination that fails to state a claim,[9] here the EEOC held:

> In determining which beliefs are protected under Title VII, the Supreme Court has held that the test is whether the belief professed is sincerely held and whether it is, in his own scheme of things, religious. . . . Moreover, in defining religious beliefs, our guidelines note that "the fact that no religious group espouses such beliefs . . . will not determine whether the belief is a religious belief of the employee . . . .
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> In the instant case, complainant argues that his unconventional beliefs about cold fusion and other technologies should be viewed as a religion and therefore protected. Complain-

1. Fusion is a nuclear reaction in which nuclei combine to form more massive nuclei with the simultaneous release of energy. THE AMERICAN HERITAGE DICTIONARY 541 (2d ed. 1982). Two researchers at the University of Utah claimed to have achieved fusion at room temperature. After others were unable to replicate their results, the vast majority of the scientific community discredited the notion of "cold fusion." Peter N. Saeta, *What Is the Current Scientific Thinking on Cold Fusion?*, Scientific American: Ask the Experts: Physics, *at* http://www.scientificamerican.com/askexpert/physics/physics6.html (last visited Feb. 4, 2002).

2. 2000 EEOPUB LEXIS 4858 (EEOC July 7, 2000); *see* Curt Suplee, *EEOC Backs "Cold Fusion" Devotee*, WASH. POST, Aug. 23, 2000, at A23.

3. *LaViolette*, 2000 EEOPUB LEXIS 4858, at *4.

4. *Id.* at *2; Suplee, *supra* note 2, at A23.

5. *LaViolette*, 2000 EEOPUB LEXIS 4858, at *2. LaViolette's beliefs, as demonstrated in the books he has authored, include finding fundamental flaws with basic physics, relativity, and quantum theory. He also believes that the ancient Egyptians were a remnant of an antediluvian culture showing signs of advanced engineering whose myths are in fact coded information from an earlier, advanced science. PAUL A. LAVIOLETTE, BEYOND THE BIG BANG (1995). He further alleges that he discovered an ancient time-capsule cryptogram written in the stellar constellations that relates the galactic cause of the apocalypse that destroyed the ancient Egyptians. PAUL A. LAVIOLETTE, EARTH UNDER FIRE (1997). He also believes that pulsars are nonrandomly distributed in the sky, interstellar beacons of intelligent origin. PAUL A. LAVIOLETTE, TALK OF THE GALAXY (2000).

6. *LaViolette*, 2000 EEOPUB LEXIS 4858, at *2; Suplee, *supra* note 2, at A23. 29 Code of Federal Regulation section 1614.107, Dismissal of Complaints, states that prior to a request for a hearing in a case, the agency shall dismiss an entire complaint that fails to state a claim under section 1614.103 or section 1614.106(a). 29 C.F.R. § 1614.107 (2000). Section 1614.103 specifies that individual and class complaints of employment discrimination and retaliation prohibited by Title VII (discrimination on the basis of race, color, religion, sex and national origin) are actionable. *Id.* § 1614.103.

7. *LaViolette*, 2000 EEOPUB LEXIS 4858, at *3.

8. *Id.* at *4-5.

9. 29 C.F.R. § 1614.107.

> ant claims he was terminated and denied the opportunity to be rehired because of religion, which embodies his cold fusion beliefs. Therefore, under the applicable law noted above, we find that the agency improperly dismissed complainant's claim of discrimination for failure to state a claim.[10]

While the EEOC subsequently stated that it did not determine the validity of LaViolette's complaint,[11] by allowing the case to go forward, it has extended Title VII protection to scientific beliefs. In doing so, the EEOC not only misapplied its own regulations, but also ignored the statutes and case law that govern it and exceeded its statutory mandate as well.

Numbers

The ultimate question presented by LaViolette's complaint is whether his scientific beliefs deserve the same protection from discrimination as another's religious beliefs. Title VII of the Civil Rights Act of 1964[12] provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[13] It defines religion to "include all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[14] Title VII has been interpreted "to protect against requirements of religious conformity and as such protects those who refuse to hold, as well as those who hold, specific religious beliefs."[15]

The EEOC, responsible for enforcing Title VII,[16] is required by its own regulations to adopt Title VII's definition of religion.[17] As Title VII's definition of religion is circular (religion includes all aspects of religious observance and practice),[18] the EEOC's regulation further adds that

> [i]n most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such a belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j), 42 U.S.C. 2000e(j).[19]

For LaViolette to prove his case of religious discrimination, whether by presenting direct or indirect evidence, he must make a prima facie case by showing four elements: (1) the plaintiff was a member of a protected class; (2) his job performance was satisfactory; (3) his employment was terminated; and (4) after he was fired, his position remained open to similarly qualified applicants.[20] If the plaintiff's membership in a protected class is not readily apparent, to satisfy the first ele-

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10. *LaViolette*, 2000 EEOPUB LEXIS 4858 at *3-4 (citations omitted).

11. Suplee, *supra* note 2, at A23.

12. 42 U.S.C. § 2000e (2000).

13. *Id.* § 2000e-2(a)(1).

14. *Id.* § 2000e(j).

15. Van Koten v. Family Health Mgmt., Inc., 955 F. Supp. 898, 900 (N.D. Ill. 1997).

16. 29 C.F.R. § 1601.1 (2000).

17. *Id.* § 1601.2. This section states that "[t]he terms person, employer, employment agency, labor organization, employee, commerce, industry affecting commerce, State and religion as used in this part shall have the meanings set forth in section 701 of Title VII of the Civil Rights Act of 1964." *Id.*

18. Redmond v. GAF Corp., 574 F.2d 897, 900 (7th Cir. 1978) (stating that "enactment does nothing to aid courts in determining the breadth of the 'beliefs' and 'practices' to be protected, other than to say they must be 'religious'"); Brown v. Pena, 441 F. Supp. 1382, 1384 (S.D. Fla. 1977).

19. 29 C.F.R. § 1605.1.

20. *Van Koten*, 955 F. Supp. at 900-01 (citations omitted).

ment of the prima facie case, LaViolette must demonstrate that (1) his practices are religious in nature, (2) he called the religious practices to the employer's attention, and (3) his religious practices resulted in his termination.[21] While the PTO obviously knew of his beliefs, to be actionable he must show that they were "religious" in nature. To make that determination, it is necessary to examine not only the relevant statutes, but also the case law referenced in them as well.

Judges

While the Supreme Court has stated that "it is no business of courts to say that what is a religious practice or activity for one group is not religion,"[22] in *United States v. Seeger*[23] *and Welsh v. United States*,[24] the Court did, indeed, say what constitutes religion. Both cases dealt with individuals who applied for conscientious objector status under the Universal Military and Training Service Act, but were denied that status.

In *United States v. Seeger*, three cases were consolidated that questioned the constitutionality of the Act's definition of "religious training and belief," which was used to determine conscientious objector status.[25] Under the Act, "religious training and belief" was defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[26] The Court created what it characterized as an "objective" test to determine if an individual's beliefs can qualify as "religious training and belief" to gain conscientious objector status.[27] Going beyond the notion of an orthodox God, the Court held that the definition of "religious training and belief" for the purpose of the statute would include

> *all sincere religious beliefs* which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.[28]

While the draft board could not question the validity of the individual's beliefs, whether the beliefs are "truly held" is a legitimate question of fact to be determined.[29] The local draft boards were ultimately to "decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious."[30] The Court did not address the Act's prohibition of conscientious objector status to those "disavowing religious belief, decided on the basis of political, sociological or economic considerations" or on a personal moral code "that war is wrong and that they will have no part of it."[31]

The other case cited in 29 Code of Federal Regulations (C.F.R.) section 1605.1, *Welsh v. United States*,[32] also dealt with defining conscientious objection status. One year after *Seeger* was decided, Elliot Welsh was imprisoned for three years for failure to enter the armed services after his application for conscientious objector status was denied;[33] Welsh's beliefs had been determined to be not sufficiently "religious" to qualify.[34] In applying and refining *Seeger*, the Court overturned Welsh's

21. *Id.* at 901.

22. Fowler v. Rhode Island, 345 U.S. 67, 70 (1953). In *Redmond v. GAF Corp.*, the Court of Appeals for the Seventh Circuit noted that courts should avoid being put into a position of having to decide what the tenets of a particular religion are. 574 F.2d at 900.

23. 380 U.S. 163 (1965).

24. 398 U.S. 333 (1970).

25. *Seeger*, 380 U.S. at 164-65.

26. *Id.* at 165 (quoting Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958)).

27. *Id.* at 184.

28. *Id.* at 176 (emphasis added).

29. *Id.* at 184-85.

30. *Id.* at 185.

31. *Id.* at 173, 185.

32. 398 U.S. 333 (1970).

33. *Id.* at 335.

34. *Id.* at 337.

conviction, stating that for a "registrant's conscientious objection to all war to be 'religious' [and qualify under the Act his], opposition to war [must] stem from the registrant's moral, ethical, or religious beliefs *about what is right or wrong* and that these beliefs are held with the strength of traditional religious convictions."[35]

Beyond *Seeger* and *Welsh*, however, there have been very few cases which defined the bounds of religion or applied Title VII's definition of religion. In one case, *Brown v. Pena*,[36] the plaintiff claimed that the EEOC discriminated against him when it dismissed his allegation of religious discrimination.[37] Brown had claimed that it was his "personal religious creed" that "Kozy Kitten Cat Food" contributed to his well-being and work performance.[38] The EEOC, and subsequently the federal district court, determined that Brown's penchant for cat food was not protected by Title VII despite his characterization of it as a "personal religious creed," but was at best a "mere personal preference."[39] While "*all* forms and aspects of religion, however eccentric are protected,"[40] personal, non-religious preferences are not.

In *Edwards v. School Board of the City of Norton, Virginia*, the United States District Court for the Western District of Virginia had to determine whether the plaintiff's beliefs were cognizable under Title VII.[41] Using various precedents, the court determined that a religious belief

> excludes mere personal preference grounded upon a non-theological basis, such as personal choice deduced from economic or social ideology. Rather, it must consider man's nature or the scheme of his existence as it related in a theological framework. Furthermore, the belief must have an institutional quality about it and must be sincerely held by plaintiff.[42]

Revelation

With the holdings of these cases, regulations, and statutes, it is possible to determine first, if LaViolette has a claim recognized by Title VII, and second, if the PTO was correct in dismissing it. Using the standard contained in 29 C.F.R. section 1605.1, it is clear that LaViolette's views are not "religious" and are not protected by Title VII. Undoubtedly, he is sincere in his beliefs, and holds them with the "strength of traditional religious views." He is obviously well educated and a well-written individual. The fact that few if any share his beliefs is of no consequence. Furthermore, it is entirely possible that his beliefs are correct—for example, that there is cold fusion and pulsars are interstellar beacons left by extraterrestrials. But unfortunately for his claim of discrimination, his beliefs fail to qualify for protection under Title VII for they do not "include moral or ethical beliefs as to what is right or wrong."[43] There is no moral component to LaViolette's views. While the EEOC cited *Welsh v. United States* in its opinion,[44] it ignored the *Welsh* requirement that the beliefs in question must be "about what is right or wrong."[45] Without this component, the beliefs fail to be religious. If LaViolette's beliefs are not religious, they cannot be protected by Title VII. If they are not protected by Title VII, the agency must dismiss the complaint of discrimination for failure to state a claim.[46]

Why cannot Title VII be interpreted to provide protection to LaViolette's scientific beliefs? Title VII was not designed to negate all forms of discrimination—only discrimination based upon race, color, religion, sex, or national origin. As stated in *McDonnell Douglas Corp. v. Green*,

35. *Id.* at 339-40 (emphasis added).

36. 441 F. Supp. 1382 (S.D. Fla. 1977).

37. *Id.* at 1384.

38. *Id.* at 1383-84.

39. *Id.* at 1385.

40. Cooper v. General Dynamics, 533 F.2d 163, 168 (5th Cir. 1976).

41. Edwards v. School Bd. of the City of Norton, Va., 483 F. Supp. 620, 624 (W.D. Va. 1980) (membership in Worldwide Church of God precluded secular work on seven holy days).

42. *Id.* at 624.

43. 29 C.F.R. § 1605.1 (2000).

44. LaViolette v. Daly, 2000 EEOPUB LEXIS 4858, at *3-4 (EEOC July 7, 2000).

45. Welsh v. United States, 398 U.S. 333, 339-40 (1970).

46. 29 C.F.R. § 1614.107.

> Congress did not intend by Title VII . . . to guarantee a job to every person . . . because he is a member of a minority group. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[47]

Only the forms of discrimination enumerated by Congress are prohibited by Title VII. Discrimination based upon intelligence, sense of humor, or in LaViolette's case—scientific beliefs—are not.

What harm is there in the EEOC remanding LaViolette's case back to the agency for processing? By expanding Title VII protection beyond what has been mandated by Congress, and by disregarding not only its own regulations but also its professed reliance on Supreme Court precedents, the EEOC has impermissibly created a new form of actionable discrimination—something the EEOC has neither the authority nor power to do.

In the recent Supreme Court case of the *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*,[48] the Court dealt with another agency's determination of its power to extend its regulations. The Food and Drug Administration (FDA) had decided that it had the power to regulate tobacco products. The Court, in determining that the FDA lacked this power, stated that agencies may not "exercise [their] authority 'in a manner that is inconsistent with the administrative structure that Congress passed into law.'"[49] To determine if an agency may regulate an area, whether it is tobacco products or scientific belief discrimination, the first question to be answered is whether Congress has directly addressed the issue. If so, the Court must give effect to Congress's unambiguously expressed intent.[50] In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, the Court concluded that

> no matter how "important, conspicuous, and controversial" the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And "in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."[51]

In *LaViolette*, the EEOC ignored Congress's "unambiguously expressed" intent of Title VII. Congress made discrimination an unlawful employment practice only if it took the form of one of five enumerated types. It did not prohibit all forms of discrimination in the workplace. While the EEOC is chartered to enforce Title VII, it has never been given the authority to create new forms of prohibited discrimination.[52] LaViolette's beliefs are not deserving of protection from discrimination against religion. Even if the EEOC is sympathetic to him, it is powerless to create new forms of protected activities, and it therefore should have sustained the agency's dismissal of his formal complaint. Only then would Congress's unambiguously expressed intent of Title VII be fulfilled.

47. 411 U.S. 792, 800-01 (1973) (citations omitted).

48. 120 S. Ct. 1291 (2000).

49. *Id.* at 1297 (citations omitted).

50. *Id.*

51. *Id.* at 1315 (citations omitted).

52. 29 C.F.R. § 1601.1 (2000).